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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. THOMAS EDWIN BURRELL BRADEN, Defendant and Appellant.	A149668 (Lake County Super. Ct. No. CR942683)

Shortly after defendant was charged with misdemeanor possession of ammunition (Pen. Code,[1] § 30305, subd. (a)(1)), the prosecutor, at arraignment, offered defendant three years' summary probation and 10 days in county jail for a plea to the misdemeanor. The offer was not conveyed to defendant. The prosecutor subsequently amended the complaint to instead charge defendant with felony possession of ammunition, and withdrew the plea offer. Defendant moved to reinstate the initial plea offer, which the trial court denied. Defendant accepted a less favorable plea agreement and was sentenced to six years in prison.

On appeal, defendant argues the original plea offer should be reinstated because his trial attorney provided ineffective assistance of counsel when she failed to convey the prosecutor's misdemeanor offer at the arraignment. We conclude defendant has failed to meet his burden of showing ineffective assistance of counsel on appeal, and his

[1] All statutory references are to the Penal Code unless otherwise specified.

contention is more appropriately raised on habeas corpus. We therefore affirm the judgment.

I. BACKGROUND

In February 2016, Deputy Cody White of the Lake County Sheriff's Department had contact with defendant. During that contact, White searched defendant and found two 12-gauge shotgun shells in defendant's pocket. Defendant was prohibited from having shotgun shells due to a prior robbery conviction.

The Lake County District Attorney filed a complaint against defendant alleging a misdemeanor count of a felon being in possession of ammunition. (§ 30305, subd. (a)(1).) During arraignment on April 26, 2016, the prosecution offered defendant a misdemeanor plea deal of three years' summary probation and 10 days in county jail, along with unspecified fees and fines. The offer was not conveyed to defendant at that time. Instead, defendant pled not guilty, and the matter was continued to May 31, 2016 for disposition or setting of a jury trial. On May 18, 2016, the prosecutor moved to amend the complaint to allege a felony—felon in possession of ammunition (§ 30305, subd. (a)(1))—and to add two prior strikes. The previous misdemeanor plea offer was withdrawn at that time.

Defendant was subsequently charged by information with the felony offense of felon in possession of ammunition. The information also alleged defendant had been previously convicted of two serious or violent felonies or juvenile adjudications: robbery (§ 211), and lewd or lascivious acts with a child under 14 years of age (§ 288, subd. (a)).

Defendant moved for specific performance of the original plea offer, asserting his counsel had been ineffective when she failed to communicate it at arraignment. The prosecutor opposed the motion and argued defense counsel could not have reasonably assessed the case as required before advising defendant whether to accept the offer. The trial court denied the motion and found defense counsel's performance was not deficient because she did not have a sufficient opportunity at arraignment to review the case and advise defendant, the plea offer did not have an expiration date, and she reasonably

would not have expected the offer to be withdrawn prior to the disposition/trial setting date.

Shortly thereafter, defendant pled no contest to the felon in possession of ammunition charge and admitted the prior robbery strike. The trial court sentenced defendant to a six-year prison term. Defendant timely appealed.

II. DISCUSSION

Defendant contends his trial counsel[2] provided ineffective assistance because she failed to convey the prosecutor's offer at arraignment. Defendant asserts he would have accepted such an offer and was thus prejudiced.

"Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result." (*People v. Dennis* (1998) 17 Cal.4th 468, 540.) Defendant bears the burden to establish both elements. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) On review, we are required to exercise deferential scrutiny, i.e., we may not second-guess counsel's reasonable tactical decisions. (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1147.) There is a " ' " ' "strong presumption that counsel's conduct falls within the wide range of professional assistance." ' " ' " (*Ibid.*) "We reverse on the ground of inadequate assistance on appeal only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission." (*Id.* at p. 1148.) "When, however, the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons." (*People v. Diaz* (1992) 3 Cal.4th 495, 557.)

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[2] Defendant was represented at arraignment by Attorney Siena Kautz, who made a special appearance on his behalf. At arraignment, Macci Baldock was appointed by the court as counsel for defendant. It is unclear whether defendant's assertion of ineffective assistance relates to Kautz, Baldock, or both.

Defendant relies on *Missouri v. Frye* (2012) 566 U.S. 134 (*Frye*) to argue defense counsel's representation was ineffective because she failed to convey the plea offer to defendant. In *Frye*, the prosecutor sent a letter to defense counsel offering two alternative plea bargains and stating the offers would expire on December 28. (*Id.* at pp. 138–139.) Defense counsel did not advise the defendant about the offers, and they expired. (*Id.* at p. 139.) The defendant ultimately pled guilty and was sentenced to three years in prison. (*Ibid.*) He then sought postconviction relief, alleging his counsel's failure to inform him of the prosecution's plea offer denied him effective assistance of counsel. (*Ibid.*) The Supreme Court noted the importance of adequate assistance of counsel in the plea bargain process: "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." (*Id.* at p. 143.) The court concluded, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." (*Id.* at p. 145.)

Having found ineffective assistance of counsel, the *Frye* court then assessed what prejudice resulted from the breach of duty. The Supreme Court held, "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable

probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." (*Frye*, *supra*, 566 U.S. at p. 147.)

Although *Frye* specifically addressed *whether* defense counsel must relay offers received, not *when* they must be relayed, the court's rationale in *Frye* strongly suggests counsel must relay offers to plea bargain promptly, according to the circumstances of the case. (*Frye*, *supra*, 566 U.S. at pp. 145–146, citing ABA Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) std. 14-3.2(a), p. 116 [defense counsel "should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney"].) Likewise, the duty of prompt communication with a client also permeates California's Rules of Professional Conduct. Specifically, rule 1.4.1(a), states in relevant part: "A lawyer shall *promptly* communicate to the lawyer's client: [¶] (1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter . . . ." (Rules of Prof. Conduct, rule 1.4.1(a), italics added.)

We are unaware of any California authority interpreting "promptly" in the context of plea negotiations. Nor has either party cited any such authority. However, at least one other jurisdiction has explored the meaning of "promptly" as set forth in *Frye*. In *Helmedach v. Commissioner of Correction* (Conn. 2018) 189 A.3d 1173, 1175 (*Helmedach*), a defense attorney failed to present the defendant with a favorable plea offer, which was later withdrawn before it could be accepted. The Connecticut Supreme Court found counsel's delay amounted to deficient performance. (*Ibid.*) In discussing the applicability of *Frye*, the American Bar Association Standards for Criminal Justice, and various rules of professional conduct, the court commented: "we find their command of promptness to be a compelling and appropriate standard for measuring the constitutional adequacy of defense counsel's performance in this context. The defendant, not defense counsel, holds the ultimate decision-making power on whether to resolve his or her criminal case through a plea agreement rather than a trial. [Citations.] . . . A

defendant's authority to decide whether to settle the case logically also must extend to deciding when to settle it. And the defendant's authority to decide whether and when to settle cannot meaningfully be exercised unless and until the defendant is made aware of the existence of any plea offers. Unjustified delay in alerting the defendant to the existence of a plea offer thus interferes with a defendant's exercise of his rights." (*Helmedach*, at pp. 1179–1180.)

"In addition, the circumstances of a case may change after an offer is made, especially during trial. New evidence may be discovered, and witnesses may alter their statements or may perform better or worse than expected when testifying. Changes of this nature will naturally affect the relative bargaining power of the parties and may lead to the retraction of an offer before it is accepted. A delay in conveying the offer, therefore, may result in its lapse because of a changed circumstance, even if defense counsel expected the offer to remain valid for a longer period." (*Helmedach*, *supra*, 189 A.3d at p. 1180, fn. 3.)

"[W]hat is prompt does not depend on any rigid time frame but, instead, depends on what is reasonable in the context and according to the circumstances of the case. Webster's Third New International Dictionary (1961) p. 1816, defines 'prompt,' when used as an adjective, as 'ready and quick to act *as occasion demands* . . . .' (Emphasis added.) This meaning is consistent with cases referencing the common meaning of the term 'promptly.' [Citations.] And cases acknowledge that what qualifies as prompt often depends on the circumstances, not a fixed time frame. See, e.g., *Irvin v. Koehler* [(2d Cir. 1916) 230 F. 795, 797] ('Promptly does not have any exact definition that can be regulated with respect to a period of time. It depends, of course, in its definition largely on the circumstances surrounding the facts which are adduced in each case . . . .'); see also Black's Law Dictionary (6th Ed. 1990) p. 1214 (defining '[p]romptly' as 'ready and quick to act as occasion demands' and explaining '[t]he meaning of the word depends largely on the facts in each case, for what is "prompt" in one situation may not be considered such under other circumstances or conditions')." (*Helmedach*, *supra*, 189 A.3d at pp. 1180–1181, fn. omitted.)

"The speed with which counsel reasonably may convey an offer will, therefore, depend on the circumstances and the context of the case when the offer is made. A particular delay in conveying an offer to enter into a plea agreement that might be justified if the offer is made during pretrial proceedings, when no developments are reasonably expected, might not be justified if the same offer is made at trial, on the eve of the jury's commencement of deliberations." (*Helmedach, supra,* 189 A.3d at p. 1181.)

We agree with the Connecticut Supreme Court that "prompt" does not require immediate conveyance of a plea offer. But it does require counsel to act as quickly as reasonable within the specific circumstances of the case. Here, the trial court concluded defense counsel acted reasonably because she had not had an opportunity to evaluate the case and the merits of the offer at arraignment, and resolution of such offers normally occurred at "the dispo[sition]/set date." In light of the above authority requiring attorneys to "promptly" convey plea offers, we are certainly concerned regarding the implication a plea offer was made prior to defendant's plea at arraignment and then not conveyed to him during the course of approximately three weeks. However, we need not address whether defense counsel's delay was appropriate because the record is devoid of other key information necessary to find ineffective assistance of counsel.

As relevant here, defendant argues his "counsel was in court . . . with him at the arraignment," "there was a formal offer by the People," and that "offer could expire at any moment after [defendant] entered a plea of not guilty at the arraignment." Based on these circumstances, defendant asserts his counsel "had a duty to advise [him] of the offer before he entered his plea."

The problem with defendant's argument, however, is he assumes his attorney received the offer prior to him entering a not guilty plea. The record is silent on this point. While the record reflects the offer was communicated "at the arraignment calendar," the record does not indicate whether the offer was made prior to defendant entering his plea. And, in fact, the record suggests the offer may have been made after defendant entered his plea. Both the Attorney General and the trial court note the plea offer was made to Baldock, who was only appointed by the court at the arraignment.

Defense counsel also acknowledged Baldock was the attorney who failed to convey the offer to defendant.[3] But the Attorney General also contends Baldock "was not present" at the arraignment, as evidenced by Kautz's special appearance on behalf of Baldock. Defendant does not identify any evidence suggesting Baldock was present at the arraignment. The record thus suggests a contradiction: (1) the plea offer was made to Baldock, (2) the plea offer was made at the arraignment calendar, and (3) Baldock was not present at arraignment. In the absence of any evidence clarifying when and to whom the plea offer was made, we cannot conclude either Baldock or Kautz was *able* to convey an offer to defendant let alone that either attorney provided ineffective assistance in failing to do so.

" ' "[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected." ' " (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Here, it is possible Kautz, who represented defendant at arraignment, never received the plea offer, and Baldock, who did receive the offer, never had an opportunity to speak with defendant at arraignment because she was not present. Likewise, it is possible Baldock never had the opportunity to convey the offer to defendant after arraignment because they had yet to meet to discuss his case prior to the prosecution withdrawing the offer. The trial court noted it was "common practice" to accept or reject such an offer at disposition, and counsel may have planned to meet and discuss the offer with defendant shortly before disposition. Barring any evidence to the contrary, we cannot conclude such an approach is unreasonable. Accordingly, defendant's claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding where all relevant facts can be developed. (See *People v. Mendoza Tello*, at pp. 266–267.)

[3] Defendant argues for the first time in his reply brief that Kautz failed to communicate the plea offer to defendant. But defendant cites no evidence suggesting the plea offer was conveyed to Kautz.

III. DISPOSITION

The judgment is affirmed.

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MARGULIES, J.

WE CONCUR:

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HUMES, P. J.

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BANKE, J.

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